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810-550—68——1

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 111

OLIVER SMITH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the district court (Pet. App. C) is not yet reported. The court of appeals affirmed without opinion.

JURISDICTION

The judgment of the court of appeals was entered on April 8, 1968. On May 8, 1968, Mr. Justice Harlan extended the time for filing a petition for a writ of certiorari to May 22, 1968, and on May 20, 1968, the petition was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the denial of petitioner's motion for a new trial based on alleged newly discovered evidence was proper.

STATEMENT

1. Petitioner and one Overbey were jointly charged in a three-count indictment with narcotics offenses. Counts 1 and 2 charged substantive violations of 21 U.S.C. 173 and 174. Count 3 charged a conspiracy to commit those offenses. When the case came on for trial on June 21, 1967, Overbey, who was at liberty on bail, did not appear. The trial judge, *sua sponte*, granted a one-day continuance and instructed Overbey's lawyer to try to find him and to notify the bonding company. On the following day, Overbey again failed to appear. His counsel did not know where he was. On motion of the prosecutor, the case was severed as to Overbey. Petitioner waived a jury, and trial was had to the court. At the conclusion of the government's case, the court dismissed count 1 for lack of sufficient evidence. The defense introduced no testimony. Petitioner was found guilty on counts 2 and 3. On August 7, 1967, he was sentenced, as a second narcotics offender, to the mandatory minimum term of ten years' imprisonment on count 2 with a concurrent sentence of five years' imprisonment on count 3.

The government's evidence consisted principally of the testimony of three federal narcotics agents—Cook, Selvaggi, and Dunne. Cook testified that on January 4, 1967, while acting in an undercover capacity,

he had a conversation with Overbey and an informant at 4:00 p.m. in a lounge in New York City. At about 4:30 p.m. the men drove to 121st St. and St. Nicholas Avenue. Overbey left and then returned about fifteen minutes later. After a conversation, Overbey departed and Cook and the informant drove away. They returned at about 5:45 p.m. to the same intersection. Overbey got in the car and handed Cook a tinfoil package which was shown to contain 48 grams of heroin (R. 50–51). Cook gave Overbey $800 in official funds, the serial numbers of which had been recorded (R. 5–10).[1]

At about 7:15 p.m., Cook and the informant met Overbey at the same corner. After a brief conversation, Overbey left. He returned after several minutes and handed Cook a plastic bag containing a white powder shown to contain 388 grams of heroin (R. 50–51). Overbey was then arrested (R. 11–12). A search disclosed that he was carrying no other package.

Selvaggi testified that he saw Overbey, after meeting Cook and the informant at 4:30 p.m., walk to the corner of 120th St. and 8th Avenue. Overbey there met petitioner and talked with him (R. 15). At about 7:00 p.m., Selvaggi observed petitioner again talking with Overbey on 120th St. and 8th Avenue. Overbey walked to the car in which agent Cook and the informant were sitting and then returned to petitioner. After a few minutes' discussion, petitioner removed a transparent package containing white powder from his

[1] "R." refers to the record in the court below, lodged with the Clerk of this Court.

coat pocket and gave it to Overbey (R. 17–18, 34–35, 56).

Petitioner was arrested on January 10, 1967 (R. 24–25).[2] Both Dunne and Selvaggi testified that at the time of his arrest petitioner was searched and was found to be carrying $137, of which two twenty-dollar bills were revealed by an examination to have been among the $800 paid by Cook to Overbey (R. 26, 47).[3]

2. Immediately following his conviction, petitioner, who had been represented by retained counsel (Mr. Siegel) at the trial, wrote a letter to the trial judge protesting his innocence and urging the court to investigate (R. 124–126).

On July 5, 1967, petitioner retained new counsel, Mr. Gilman. On July 20, 1967, Mr. Gilman filed a motion for a new trial on behalf of petitioner under Rule 33, F.R. Crim. P. Appended were affidavits by himself (R. 88–89), one Lena Sessoms (R. 100–103), one Virginia Donald (R. 104–107), petitioner's wife (R. 118–123), and petitioner (R. 108–117). The motion was not made on grounds of newly discovered evidence (R. 227–228). Counsel recognized that Rule 33 provides that motions for a new trial not based on newly discovered evidence "shall be made within 7 days after verdict or finding of guilty" (see Pet. 4 for text of Rule) and that the district court has no jurisdiction to consider untimely motions. *United*

[2] Selvaggi testified that he believed an agent had tried to follow petitioner after he had transferred the 388-gram package to Overbey, but had lost him (R. 33, 36).

[3] This $800 sale was the subject of the charge in count 1 of the indictment, dismissed as to petitioner by the court.

States v. *Smith*, 331 U.S. 469; see *United States* v. *Robinson*, 361 U.S. 220, 225. He nevertheless argued that petitioner's letter written immediately after his conviction should be deemed a sufficient motion, to which the affidavits were merely supplemental.

On August 7, 1967, the district judge denied the motion on the grounds (Pet. App. B):

> first, that it is untimely, and second, that even if timely made the papers do not justify the relief sought.

The affidavits, which were designed to establish an alibi, showed, in sum, the following.[4] On the evening of January 4, 1967, the date of the narcotics transactions, Mrs. Smith (petitioner's wife) attended a Broadway show with Virginia Donald. Mrs. Sessoms had agreed to baby-sit for the Smiths that night. She stated that at 5:00 p.m. she telephoned the Smith residence to advise that she would be there at about 7:00 or 7:30 p.m. and Mrs. Smith answered the telephone. At 7:00 p.m. when Mrs. Sessoms called back to say that she could not baby-sit, petitioner answered the telephone. Virginia Donald's affidavit was to the effect that she telephoned the Smith residence at 6:00 p.m. to tell Mrs. Smith to meet her outside at 7:30 p.m. to go to the theatre and that petitioner answered the telephone.[5] Mrs. Smith stated that Mrs.

[4] While not directly pertinent to the proceeding here—a motion for a new trial based on alleged newly discovered evidence of Overbey—we set forth in some detail the prior affidavits and the government's response thereto because of their bearing on petitioner's claim that he was not the man who supplied Overbey with narcotics on January 4, 1967.

[5] Both Mrs. Donald and Mrs. Sessoms stated that they recognized petitioner's voice.

Sessoms had telephoned twice on January 4, 1967—at 6:00 p.m. and just before 7:30 p.m.—and that petitioner answered on both occasions. She said Virginia Donald called at about 7:00 p.m. and spoke first to petitioner.

Petitioner confirmed that he was home at the critical times on January 4, 1967. He stated that his witnesses were "ready to testify" (R. 110) at the trial but that Mr. Siegel (whom he credited as a lawyer of considerable reputation at the criminal bar whose skill "even now" he had no reason to doubt (R. 109)) apparently determined not to call them in the belief that the government had not made out a case. Petitioner alleged that, in making that decision, Mr. Siegel had taken an unwarranted risk and had not afforded him adequate representation (R. 116). Petitioner also stated that, at the time of his arrest, he had $240 on his person which the agents took, examined, and then returned (R. 115). He alleged that the government's trial testimony was a "fantastic concoction", and that he was made the "patsy" for this offense, presumably because of his prior narcotics record.

In response, the government pointed out the numerous inconsistencies between the alibi affidavits of Mrs. Sessoms, Mrs. Donald, and Mrs. Smith. In addition, the prosecutor called the court's attention to the fact that, following his first narcotics conviction in 1960, petitioner similarly had immediately written letters to the trial judge protesting his innocence, and asserting that the government agents who testified against him at the trial had lied (R. 136–137).

3. On September 18, 1967, the instant motion for a new trial, based on alleged newly discovered evidence of Overbey, was filed. Attached was an affidavit of Overbey (R. 186–191), who had been re-taken into custody, to the effect that petitioner had been "framed" and that he (Overbey) had obtained the narcotics transferred on January 4, 1967, from one Bernie Robinson.[6] The trial judge ordered a hearing on the basis of Overbey's allegations.

At the hearing held on November 2, 1967,[7] Overbey repeated his assertion that he had not obtained narcotics from petitioner (R. 293, 298, 302–303, 312). He testified that, at the time of trial, he was in the area of Times Square, where he remained for a period of two or three weeks. He had been arrested by New York City police on July 4, 1967, for disorderly conduct and had been turned over to federal authorities on August 11, after spending more than a month in a New York penitentiary (see R. 284–286; Pet. App. C, 17). Overbey said he had known petitioner for about fifteen years and that they had been in prison together (R. 330). Petitioner had arranged his bail on the instant charge (R. 331).[8] After the indictment,

[6] Also appended to the motion was an affidavit of Mr. Gilman (R. 176–185) and another of petitioner, similar in content to the affidavits appended to the prior motion (R. 167–175).

[7] Meanwhile, in August, Overbey had refused to plead guilty to count 3 of the indictment against him for the stated reason that it charged a conspiracy with petitioner, who was not involved. He later pleaded guilty to counts 1 and 2 only, and received the mandatory minimum sentence, as a second narcotics offender, of ten years' imprisonment on each count, the sentences to run concurrently (R. 199, 253, 257–260).

[8] Petitioner had admitted in his letter of June 22 to the trial judge that he had arranged bail for Overbey (R. 125).

but before the trial, Overbey had told petitioner that Bernie Robinson was the person from whom he had obtained the narcotics (R. 333–334). During February, March and April of 1967, Overbey was brought to the courthouse and had several conversations with his attorney to the effect that he alone was involved. Present on many of these occasions were petitioner and his attorney, Mr. Siegel (R. 316–317).

Overbey testified that he had a record of five convictions, including three felonies (R. 281–284).

Lenora Porter, Overbey's girl friend, confirmed that petitioner had supplied Overbey's bail. She indicated that she knew petitioner and implied that he was the first person to whom she turned after arrest (R. 340–341, 349).

Mr. Gilbert, Overbey's trial counsel, testified that Overbey had always told him that petitioner was not involved in this case. He stated that he knew Mr. Siegel from prior court cases and communicated quite freely with him (R. 361, 368–369).

ARGUMENT

The record fully supports the decision of the district court denying the second motion for a new trial. As the district judge held (Pet. App. C, 19), petitioner failed to establish either that the alleged new evidence by Overbey was "newly discovered" or that it would probably have produced a different result if a new trial were granted. As to the first point, petitioner made no effort to try to locate Overbey or to seek a continuance when his absence was first learned, although petitioner was his long-time ac-

quaintance, knew his girl friend, and had been instrumental in securing bail for Overbey. While it is impossible to state whether such efforts would have been successful, petitioner introduced no evidence to show that they would not, and it was his burden to prove that the unavailability of Overbey at the trial was not due to lack of diligence on petitioner's part.[9] *E.g., United States* v. *Edwards,* 366 F.2d 853, 874 (C.A. 2), certiorari denied *sub nom.* 386 U.S. 908, 919. The trial judge also found that Overbey's evidence would not likely produce a different result in the event of a new trial. In view of Overbey's five prior convictions and the weight of the countervailing evidence, that finding is not unreasonable. Moreover, after observing Overbey testify, the court specifically found that his story was "implausible" (Pet. App. C, 19). Such a determination is entitled to great weight. *United States* v. *Johnson,* 327 U.S. 106.

Petitioner argues that, notwithstanding the foregoing impediments to the relief he seeks, this Court should grant him a new trial because he appears before it garbed in "the cloak of innocence" (Pet. 13), "a guiltless man * * * imprisoned at Atlanta" (Pet. 11). The evidence, however, does not bear out these assertions.

The court observed and credited the testimony of narcotics agent Selvaggi, identifying petitioner as the person from whom Overbey received a package of

[9] It should be noted that nowhere did Overbey or his lawyer affirmatively indicate that Overbey was prepared to testify in support of petitioner at the time of the trial. This necessary link in the chain of petitioner's argument is left to inference.

heroin subsequently transferred to agent Cook. Petitioner has offered no plausible reason, nor are we aware of any, why Selvaggi's testimony should not be credited. The affidavits of petitioner's alibi affiants are marked by inconsistencies as to the times when telephone calls, allegedly answered by petitioner at home, were made. This uncertainty is critical since petitioner could very well have been home both shortly before, and shortly after, the transfer of the narcotics to Overbey. Finally, the evidence of Overbey, as the district judge found, is not entitled to credence. In short, there clearly is not, on this record, the showing of innocence necessary to warrant the extraordinary overturning of a finding of guilt reached on sufficient evidence and by lawful and proper procedures.[10]

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[10] Petitioner attempts to draw an inference of innocence from a daily report of agent Selvaggi on January 4, 1967, which does not allude to petitioner (Pet. 8–9). The report is not a producible "statement" under 18 U.S.C. 3500 and merely purports to list the agent's whereabouts at various times for purposes of showing expenses incurred. The court of appeals, which considered the report, was plainly correct in treating it as of no significance on the issue of petitioner's guilt. We are lodging the report with the Clerk of this Court, along with a copy of agent Selvaggi's report dated January 16, 1967, which does inculpate petitioner and which was furnished to petitioner's counsel at trial in compliance with 18 U.S.C. 3500.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.
FRED M. VINSON, JR.,
Assistant Attorney General.
BEATRICE ROSENBERG,
ROGER A. PAULEY,
Attorneys.

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